# Supreme Court of the United States

**October Term, 1967**

**No. 823**

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

*Petitioners,*

—against—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF

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### Preliminary Statement

Petitioners ask this Court, upon a writ of certiorari granted on January 29, 1968 (R. 91a),* to review a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1967 (R. 90a-91a). That judgment unanimously affirmed a judgment of the United States District Court for the Southern District of New York which dismissed petitioners' compiaint for failure to state a claim on which relief can be granted (R. 75a-78a).

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* References designated "R." refer to the Joint Appendix filed in this Court.

## Questions Presented

1. May a municipal employee be dismissed for refusing to answer questions concerning the proper performance of his duties on the ground that his answers would tend to incriminate him, or for withholding information by refusing to sign a waiver of immunity from prosecution when called to testify about his employment by a grand jury, and then failing to justify or explain his action at a hearing where he was given full opportunity to do so?

2. Were petitioners' dismissals rendered unlawful because the City Commissioner of Investigation, pursuant to court order, intercepted and recorded telephone conversations over a telephone leased by the City to transact official business, to which conversations certain of the petitioners were parties, even though no evidence derived from the interceptions was offered against the petitioners in any subsequent proceeding?

## Relevant Statutes

The primary statutes involved, Section 1123 of the New York City Charter, Section 813-a of the New York Code of Criminal Procedure, Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, and New York State Civil Service Law § 75, are set forth in the Appendix, infra, pp. 34-39.

## The Facts

The material facts are not in dispute. Petitioners were formerly employees of the New York City Department of Sanitation assigned to the Marine Transfer Station at 91st Street and the East River in Manhattan. In the fall of

1966 the City Commissioner of Investigation learned that Sanitation Department employees were failing to charge private cartmen proper fees for the use of City facilities at the Marine Transfer Station. Instead, the employees were alleged to have diverted fees to their own use resulting in a loss of income to the City of hundreds of thousands of dollars (R. 5a, 71a-72a).

In the course of his investigation, the Commissioner obtained authorization from Supreme Court, New York County, under the provisions of Section 813-a of New York Code of Criminal Procedure, to tap a telephone (AT 9-7935) leased by the Department of Sanitation for the transaction of official business at the Marine Transfer Station. This official City telephone was the only line tapped in the investigation (R. 72a).

In November, 1966, the Commissioner or his deputy questioned petitioners concerning their duties and employment (R. 41a-65a). Prior to being questioned they were advised of their right to counsel, their right to remain silent and not be compelled to be a witness against themselves, and that anything they said could be used against them. They were also apprised of the provisions of Section 1123 of the New York City Charter which provides for dismissal where a City employee fails to testify concerning the property, government or affairs of the City or his official conduct on the ground that his answer would tend to incriminate him (R. 73a-74a). Twelve of the petitioners refused to answer claiming the constitutional privilege against self-incrimination. Three of the petitioners were interrogated and gave answers without claiming the privilege against self-incrimination (R. 6a).

On December 2, 1966, the Commissioner of Sanitation suspended the petitioners. Those who had refused to testify on the basis that their answers would tend to incriminate them were advised that their suspensions were based on Section 1123 of the City Charter. The others were advised that their suspensions were based on information received from the Commissioner of Investigation concerning irregularities arising out of their employment (R. 7a, 45a, 53a).

On December 14, 1966, petitioners commenced this action for declaratory judgment and injunctive relief. As of that date petitioners had been suspended but not dismissed from their employment. Subsequently, on December 16, 1966, the Commissioner of Sanitation issued formal charges under Section 75 of the New York Civil Service Law against the twelve petitioners who had refused to answer questions put to them by the Commissioner of Investigation or his deputy. At the time of argument before the District Court no hearings had been held on these charges (3a, 56a-70a).

After argument of the case in the District Court but prior to the argument in the Second Circuit Court of Appeals the following relevant events occurred.

Hearings were held on the charges made against the twelve employees who invoked the privilege against self-incrimination in their appearance before the Commissioner of Investigation. The only evidence offered against them was the transcript of proceedings before the Commissioner of Investigation. Petitioners were represented at the disciplinary proceedings by the same counsel who appeared for them in the District Court and on their appeal. No transcripts, recordings or other evidence obtained through a

wiretap were offered against petitioners or received in evidence during the disciplinary proceedings.

The three petitioners who did not assert the privilege against self-incrimination when called before the Commissioner of Investigation were later summoned to appear before a grand jury and asked to sign waivers of immunity. Each of them refused to sign a waiver. Subsequently, they were served with amended charges by the Commissioner of Sanitation to the effect that they had violated Section 1123 of the New York City Charter by their refusal to waive immunity before the grand jury.

In the hearings conducted by the Department of Sanitation the charges against those three petitioners related solely to their refusal to waive immunity before the grand jury. No evidence or testimony of any kind based upon a wiretap was offered against them.

At the disciplinary proceedings petitioners offered no testimony to explain their refusal to answer questions put to them by the Commissioner of Investigation or his deputy or their refusal to sign waivers of immunity. Their defense rested solely on claims of unconstitutionality or illegality in the proceedings.

Each of the petitioners was dismissed after the hearings for violations of Section 1123 of the New York City Charter.

## Opinions Below

The District Court on respondents' motion dismissed the complaint on grounds of abstention. Subsequent to the District Court decision the New York State Court of Appeals decided *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967),

which authoritatively construed Section 1123 of the New York City Charter. The Second Circuit Court of Appeals noted that this construction removed the federal abstention question from the case and proceeded to consider the merits. In its opinion, the Circuit Court held "[t]here was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs" (R. 87a). That Court also held that there had been no "trespassory intrusion into private, constitutionally protected premises" as was found to exist by this Court in *Berger* v. *New York*, 388 U. S. 41 (1967). The Circuit Court stated (R. 88a):

> "We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 USC §605 * * * or deprivation of rights under the Fourth Amendment has been established."

## SUMMARY OF ARGUMENT

### I. Respondents have not violated petitioners' privilege against self-incrimination.

Since this Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551 (1956), the courts of New York have made the implied constitutional guarantee of a full administrative hearing an integral part of the disciplinary procedure when Charter § 1123 is invoked against a public employee.

This approach is consistent with the decisions of this Court in *Lerner* v. *Casey*, 357 U.S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U.S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U.S. 1 (1960). These cases upheld the

dismissal of a public employee where he was asked questions of legitimate concern to his employer, refused to answer those questions and then failed to explain that refusal in a subsequent administrative hearing held for that purpose.

This Court's recent decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) and *Spevack* v. *Klein*, 385 U.S. 511 (1967), do not support petitioners' contentions. Both the opinion of the Court (fn. 3, at p. 516) and the concurring opinion of Mr. Justice Fortas (at p. 519), in *Spevack*, distinguish that case from the one at bar.

In light of the decision in *Garrity*, there is even less reason to support the contention that a public employee may refuse to answer questions concerning the performance of his duties, and retain his job. As a result of *Garrity*, a public employee need not fear subsequent criminal prosecution based on any testimony given to his employer or a grand jury.

## II. The wiretap in this case did not violate petitioners' Fourth Amendment rights.

A. The decisions of this Court in *Berger* v. *New York*, 388 U.S. 41 (decided June 12, 1967) and *Katz* v. *United States*, 389 U.S. 347 (decided December 18, 1967), should not be given retroactive application. Under the tests established by this Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Tehan* v. *Shott*, 382 U.S. 406 (1966), *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the constitutional standards for eavesdrop warrants, set forth in *Berger* and *Katz*, should be applied prospectively to trials or proceedings commenced after the date of these decisions.

The basic premise of this test is that new judicial constructions of constitutional provisions have been applied retroactively where the purpose served by the new rule is preservation of the "integrity of the truth-determining process at trial . . ." *Stovall* v. *Denno*, 388 U.S. at 298. This was not the case in either *Berger* or *Katz* where there was no doubt as to the reliability of the evidence barred by the new rules.

At the time of the tap involved here, and thereafter until the decision in *Berger*, law enforcement officials could not ascertain the standards which that decision established for eavesdrop warrants; and until *Katz*, they believed that nontrespassory eavesdrops were beyond the scope of Fourth Amendment protection. Thus, there would be a substantial adverse affect on the administration of justice if *Berger* and *Katz* were applied retroactively, thereby invalidating thousands of prosecutions based on what were believed to be legal eavesdrops and wiretaps. Respondents relied on a state statute that had been held to be constitutional.

Nor is the Court presented with a situation where the rules of *Berger* and *Katz* should be applied to cases on direct appeal at the time of those decisions. Unlike the situation which the Court faced in *Linkletter* v. *Walker* and *Tehan* v. *Shott*, no decision of this Court since *Berger* and *Katz* has applied these cases on direct appeal. Therefore, the Court should apply the same test it enunciated in *Johnson* v. *New Jersey* and *Stovall* v. *Denno* and apply the new rules to proceedings commenced after the decisions in *Berger* and *Katz*.

B. Even if the doctrines of *Berger* and *Katz* are applied retroactively, the wiretap did not taint the subsequent proceedings.

No evidence secured through the tap was ever used against petitioners. The tap was not used to identify peti-

tioners as suspects, nor as the basis for the investigation. Instead, the tap was the source of certain questions which petitioners refused to answer. Under these circumstances, any alleged taint, caused by the tap, has been dissipated. *Nardone* v. *United States*, 308 U.S. 338; *United States* v. *McGavic*, 337 F. 2d 317 (6th Cir. 1964); *Rogers* v. *United States*, 330 F. 2d 535 (5th Cir. 1964); *Hollingsworth* v. *United States*, 321 F. 2d 342 (10th Cir. 1963).

C. Petitioners have not established a violation of their Fourth Amendment rights under the doctrines of *Berger* and *Katz*. This Court has not held that warrants meeting Fourth Amendment standards are required in all cases where conversations are seized. Under the facts of this case, petitioners could not reasonably expect that calls made on the phone at the 91st Street Marine Transfer Station would be free from interception by their employer during an authorized investigation into irregularities regarding the performance of their duties.

Although not indicated in the record, the facts here differ markedly from those presented in *Katz*. If the Court should reach the constitutional question of the validity of the tap under the Fourth Amendment, the case should be remanded to the District Court in order to develop a record which would permit a sound constitutional determination as to whether the tap of this government-owned phone, in light of all the circumstances, including the regulations governing the use of this phone, was an unconstitutional search and seizure.

D. While an unconstitutional wiretap would be inadmissible in a state court proceeding under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), a finding of a violation of § 605 of the Fed-

eral Communications Act alone, does not sustain petitioner's claims.

Under *Schwartz* v. *Texas,* 344 U.S. 199, the exclusionary rule applicable to violations of constitutional provisions by state officials, does not apply to such violations of federal statutes. Further, for the reasons cited in B, above, there is no causal connection between the tap and petitioners' subsequent dismissals.

## POINT I

**As applied in New York, in administrative practice and through judicial interpretation, Charter §1123 meets the constitutional requirements of due process expressed by this Court in *Slochower v. Board of Education* and subsequent decisions.**

In *Slochower* v. *Board of Education,* 350 U. S. 551 (1956), this Court was called upon to review a dismissal pursuant to §903 of the New York City Charter (predecessor to the present §1123). Slochower, a Brooklyn College professor, was summarily dismissed pursuant to §903 for failing to answer questions concerning his membership in the Communist Party before a Senate Subcommittee on Internal Security. This Court overruled the holding of the New York Court of Appeals that under §903 an assertion of the privilege against self-incrimination in defiance of the Charter provision is equivalent to a resignation, saying:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occuring before a federal committee whose inquiry was announced as not directed at 'the property, affairs

> or government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." 350 U.S. at pp. 558-559.

Subsequent to *Slochower* this Court has held that state statutes authorizing the dismissal of public employees who fail to answer questions in an investigation of matters of legitimate concern to the state or agency involved do not violate due process where a hearing is held prior to dismissal. *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U. S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellants were dismissed pursuant to the relevant statute, after a hearing before an appropriate administrative body at which time they were given the opportunity to explain their refusal to testify. The ultimate dismissal in each instance was based not on the mere refusal to testify but on the breach of legitimate conditions of employment—candor and integrity—that the refusal reflected. This is not at all the built-in inference of guilt imputed to an employee's invocation of the privilege which this Court condemned in *Slochower* and *Nelson*.

In the case at bar, upon their refusal to testify before the Commissioner of Investigation or their failure to waive immunity and testify before the Grand Jury, each of the fifteen petitioners was subsequently given a full hearing

before the Commissioner of Sanitation. This hearing dealt with petitioners' refusal to answer questions concerning the performance of their job.

It should be noted that in *Lerner* and *Beilan* Mr. Justice Douglas, with whom Mr. Justice Black concurred, based his dissent, covering both cases, on the propriety of the government concerning itself with the opinions and beliefs of its employees. 357 U.S. at p. 415. The dissent, however, recognized the right of the government to inquire into the "actions of men" such as the fitness of the public employee for his job for reasons of health, promptness, record for reliability. 357 U.S. at p. 415.

Dissenting in a separate opinion, in *Lerner,* Mr. Justice Brennan stated:

> "But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications of employment. It may well be that in such a case the State would be fully justified in discharging the employee as 'untrustworthy and unreliable.'" 357 U.S. at p. 422.

Since the *Slochower* decision, the New York Courts have made the implied constitutional guarantee of "proper inquiry" an integral part of the disciplinary procedure whenever §1123 is invoked against a public employee. *Gardner* v. *Murphy,* 46 Misc. 2d 728 (Sup. Ct., N.Y. Co., 1965); *Conlon* v. *Murphy,* 24 AD2d 737 (1st Dep't., 1965). In *Gardner,* the court reviewed this Court's decisions which recognized both the interest of the government in the loyalty of its employees and the need to protect the constitutional rights of those employees, and found:

> "Logic thus dictates the post-*Malloy* v. *Hogan* (378 U.S. 1) applicability to State proceedings of the doctrine enunciated in *Slochower* v. *Board of Educ.* (350 U. S. 551); Automatic dismissal from public employment predicated *solely* upon one's invocation of the Fifth Amendment privilege against self-incrimination is proscribed by the United States Constitution * * *." 46 Misc. 2d at p. 734.
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> * * * * *
>
> "If the mere statement of present refusal to waive one's Fifth Amendment rights is interpreted as a prima facie rather than a conclusive basis for discharge, the subject provisions are not repugnant to constitutional mandates as mirrored by the United States Supreme Court pronouncements." *Ibid.*, at p. 736.

The New York courts consider notice and a hearing in proceedings under §1123 as not merely a *pro forma* requirement, but as a substantive administrative remedy afforded petitioners in this case. This reflects the concern expressed by this Court in *Slochower*, that absent such a hearing:

> "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which the are directed, or justification for exercise of the privilege." 350 U. S. at p. 558.

The decision of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967), now before this Court, would appear to have ended any uncertainty as to the New York Court of Appeals' interpretation of §1123.

In upholding Gardner's dismissal under § 1123 for failure to waive immunity and testify before a grand jury, the Court of Appeals cited *Nelson* v. *County of Los Angeles*,

362 U. S. 1 (1960) for the proposition that there was no violation of the privilege against self-incrimination where the employee had a hearing and the information sought concerned the performance of his duties as a public employee.

Petitioners seek to characterize the proceedings before the Commissioner of Investigation and the Grand Jury as criminal investigations rather than disciplinary proceedings (Pet. Br., pp. 15-16). Such characterization is neither helpful nor relevant.

The City employs over 300,000 persons in various jobs of varying responsibility. These employees are supervised, and their conduct on the job investigated, in a number of ways. If the inquiry here were limited merely to petitioners' competency to perform their tasks, then the only proper official to make such inquiry would be the Commissioner of Sanitation or his authorized deputy. But the inquiry here, though related to the performance of petitioners' duties, also concerned misconduct amounting to a criminal act. In such instances, the protection of the City's interests is entrusted to the Commissioner of Investigation. Further, any testimony given by City employees before a grand jury must be, and was, limited to matters concerning their conduct as City employees, in order for § 1123 to be applicable.

Petitioners also persist in contending that the City has dismissed them merely for exercising their constitutional right to remain silent. In support of this contention they cite two recent decisions of this Court, *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). As to *Garrity*, the Circuit Court below noted that "that holding has no application to the present case

where the employees did not testify, but relied upon their claims of privilege'' (R. 87a). *Garrity* held only that where testimony was given by public employees under circumstances where failure to testify could lead to dismissal, their testimony could not be used against them in subsequent criminal prosecutions. The *Garrity* case would appear, therefore, to remove any basis for a refusal by a government employee to answer questions concerning his official duties when questioned by duly authorized government officials charged with the duty of investigating the employee's conduct. *Garrity* establishes that the employee's answers may not be used against him in a criminal proceeding. Obviously this ruling would also extend to any evidence discovered as a result of his answers.

In view of the unavailability of the answers for use in any criminal proceeding, the Fifth Amendment should not be extended to bar questioning of government employees to obtain information concerning crime or to determine whether they have been guilty of misconduct in performing their official duties. It is true that the immunity obtained as a result of giving answers when so questioned is not given with the formality of a specific grant of immunity and that the scope of the immunity is not so broad as that given under such a grant. The immunity, however, would appear to be broad enough to satisfy Fifth Amendment requirements since it extends to the answers and the fruits of the answers. In *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 79 (1964), this Court held that a similar immunity with regard to federal prosecution, limited to compelled testimony and its fruits, satisfied the requirements of the Fifth Amendment.

As to the effect of the decision in *Spevack*, which involved the disbarment of an attorney, this Court noted that it did not reach the question of the discharge of a public employee who refused to testify in disciplinary proceedings (fn. 3, 385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

The distinction between *Spevack* and the present case was also made clear by Mr. Justice Fortas in his concurring opinion. He stated (385 U. S. at p. 519):

> "I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties as distinguished from his beliefs on other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

Despite the obvious legitimate interest of the City in the fitness of its employees to perform their duties and the need for employees to cooperate in an official inquiry on this question, petitioners claim the right (1) to refuse to answer questions concerning their employment put to them by properly authorized City officials or to withhold information by refusing to sign a waiver of immunity when called to testify before a grand jury, (2) to refuse to offer any explanation or justification for such refusal at a hear-

ing especially called for that purpose, and (3) to retain their City employment. This is not the law.

In its opinion below the Court of Appeals stated (R. 87a):

> "It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

A City employee has the right to refuse to answer when questioned about his employment by appropriate City officials but he does not have a right to fail to justify or explain his refusal at a hearing called to afford him that opportunity, and at the same time retain his job.

## POINT II

**The use of a wiretap in this case by the Commissioner of Investigation did not violate petitioners' constitutional rights under the Fourth and Fourteenth Amendments.**

### A. *Berger* and *Katz* Should Not Be Given Retroactive Application.

Petitioners' claim that the wiretap violated the Fourth Amendment's proscription against unreasonable searches and seizures rests primarily on the decisions of this Court in *Berger* v. *New York*, 388 U.S. 41 (decided June 12, 1967)

and *Katz* v. *United States*, 389 U.S. 347 (decided December 18, 1967). *Berger* applied Fourth Amendment standards to trespassory eavesdrops and *Katz* specifically held that non-trespassory eavesdrops, *e.g.*, wiretaps, were also subject to constitutional scrutiny.

Assuming, *arguendo*, that under the decisions in those cases the tap carried out by the Commissioner of Investigation did violate petitioners' rights under the Fourth and Fourteenth Amendments, the doctrines established in *Berger* and *Katz* should not be applied retroactively to this case. Under the tests established by this Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Tehan* v. *Shott*, 382 U.S. 406 (1966), *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the constitutional standards for eavesdrop warrants, set forth in *Berger* and *Katz*, should be applied prospectively to trials or proceedings commenced after the date of these decisions. As the Court noted in *Linkletter*, *supra*, "The Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" 381 U.S. at 628.

In determining whether new constitutional rules should be applied retroactively, this Court has adhered to the following standard:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. at p. 297.

See also *Linkletter* v. *Walker*, 381 U.S. at p. 636; *Johnson* v. *New Jersey*, 384 U.S. at p. 727; *Tehan* v. *Shott*, 382 U.S. at pp. 410, 413.

Thus, new judicial constructions of constitutional provisions have been applied retroactively where the purpose served by the new rule is preservation of the "integrity of the truth-determining process at trial * * *". *Stovall* v. *Denno*, 388 U.S. at 298. Examples of such rules are the right to trial counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the right of an indigent to a fair appeal, *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and the right to a procedure which leads to a fair appraisal of the voluntariness of a confession, *Jackson* v. *Denno*, 378 U.S. 368 (1964). In each of these cases the new rule was applied retroactively.

As the Court reasoned in *Johnson*:

> "In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence 'the reliability and relevancy of which is not questions.' 381 U.S., at 639. * * *
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> * * * * *
>
> "[I]n *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which concerned the right of an indigent to the advice of counsel at trial, we reviewed a denial of habeas corpus * * * In [this] instance we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact finding process' and averted 'the clear danger of convicting the innocent.' *Linkletter* v. *Walker*, 381 U.S., at 639; *Tehan* v. *Shott*, 382 U.S., at 416." 384 U.S., at pp. 727-28.

Applying this reasoning to *Johnson*, this Court refused to apply retroactively its decisions in *Escobedo* v. *Illinois*, 378 U. S. 479 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), both of which broadened persons' rights under the Fifth Amendment. Similarly, in *Stovall* v. *Denno*, *supra*, the Court applied its decision in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 363 (1967), prospectively in cases involving the right to counsel at pre-trial confrontations.

In the case at bar there is no compelling reason to apply retroactively the new standards enunciated in *Berger* and *Katz*. The purpose of these new rules is to protect the privacy of certain conversations against future invasions by law enforcement officers through searches that do not meet Fourth Amendment standards. Here, as in the applications of *Mapp*, *Escobedo*, *Miranda*, *Griffin*, *Wade*, and *Gilbert*, any past infringement of petitioners' rights, resulting from actions based on constitutionally inadequate state procedures, can no longer be rectified. Even more than in *Mapp*, *Escobedo*, *Miranda*, *Griffin*, *Wade*, and *Gilbert*, the new rules in *Berger* and *Katz* do not affect the integrity of the fact-finding process. There is no allegation that the wiretap evidence, even if it had been used, was unreliable. The new rules in *Berger* and *Katz* were designed to control the obtaining and use of admittedly reliable evidence. The extension of Fourth Amendment protection to eavesdrops was dictated by this Court's conclusion that its prior decisions did not provide sufficient safeguards against unconstitutional invasions of privacy. Such a purpose is not furthered by the retroactive application of the new rule.

Moreover, in this case there is no allegation that evidence obtained from the allegedly unconstitutional wiretap was

used against petitioners in any subsequent proceeding. Rather, the argument is made that the wiretap triggered a series of events leading to an impairment of petitioners' privilege against self incrimination. Yet, in *Escobedo* and *Miranda,* involving more serious aspects of the Fifth Amendment's privilege against self-incrimination, this Court held that those decisions applied only to trials beginning after the date of each decision. Certainly, the claims of petitioners, with regard to the new rules in *Berger* and *Katz,* do not merit greater consideration than was accorded Johnson with regard to the application of *Escobedo* and *Miranda.*

The other two tests established by this Court for determining whether new rules are to be applied retroactively are equally compelling in arguing for prospective application of *Berger* and *Katz.* There is little doubt that the Commissioner of Investigation has relied on the past decisions of this Court concerning wiretapping and eavesdropping, and there would be a substantial adverse effect on the administration of justice if *Berger* and *Katz* were applied retroactively, thereby invalidating thousands of prosecutions secured through the use of eavesdrops and wiretaps.

At the time of the tap by the Commissioner of Investigation, his conduct was not proscribed under the Fourth Amendment standards subsequently established in *Berger* and made specifically applicable to non-trespassory eavesdrop orders in *Katz.* The court order here, secured in 1966, was obtained pursuant to a statute that had been held not to violate the Constitution. *Harlem Check Cashing Corp.* v. *Bell,* 296 N.Y. 15 (1946); *People* v. *Stemmer,* 298 N.Y. 728 (1948), *aff'd.* by an equally divided court, 336 U.S. 963, *petition for rehearing denied,* 337 U.S. 921. In light of the

settled authority prior to *Berger*, the United States Court of Appeals for the Second Circuit held, in 1961, that a claim under 28 U.S.C. §2281 that Criminal Code §813-a "contravenes the Fourth or Fifth Amendment to the Federal Constitution was insubstantial * * * ". *Williams* v. *Ball*, 294 F. 2d 94 (2d Cir. 1961) *cert. den.*, 368 U.S. 990.

Respondents' reliance on pre-*Berger* standards influenced not only their actions but their presentation of their case to the district court. If respondents had known, in December, 1966, what the Court made clear in *Berger* and *Katz*, respondents might have attempted to demonstrate that the investigation was based on independent evidence free from the taint of the wiretap. Also, respondents might have attempted to show that the wiretap order in this case met the standard established in *Berger* and *Katz*.

Finally, the administration of justice would be seriously impaired by casting the shadow of illegality over proceedings undertaken in good faith by law enforcement officials. As the New York Court of Appeals noted in *People* v. *Kaiser*, 21 N.Y. 2d 86, at p. 98:

> "Thousands of eavesdropping orders have been issued in reliance upon the statute [813-a] and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan*, 11 NY 2d 350, cert. den. 371 U.S. 877; *People* v. *Pugach*, 16 NY 2d 504, app. dsmd. 383 U.S. 575; *People* v. *Cohen*, 18 NY 2d 650, cert. den. 385 U.S. 976, rehearing den. 385 U.S. 1032.)"

Until *Berger*, law enforcement officials could not ascertain the standards which that decision established for eavesdrop warrants, and until *Olmstead* and *Goldman* were overruled in *Katz*, law enforcement officials in good faith believed that

non-trespassory eavesdrops, *e.g.*, wiretaps, were beyond the reach of the Fourth Amendment. To apply these new rules to proceedings and trials which commenced prior to the decisions in *Berger* and *Katz* would threaten the finality of large numbers of convictions based on reliable evidence frequently secured, as in the case of New York, under a statute assumed to be constitutional under prior decisions of this Court. (See statutes cited in *Berger*, 388 U.S. at pp. 47-48, fns. 4, 5).

It should be noted that *Linkletter* and *Tehan* held that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they (*Mapp* and *Griffin*) were decided, whereas *Johnson* and *Stovall* held that the doctrines established in *Escobedo, Miranda, Wade*, and *Gilbert* applied only to trials beginning after the dates they (*Escobedo, Miranda, Wade*, and *Gilbert*) were decided. However, this court in *Johnson* made clear the reason for those exceptions to the general rule of prospective application:

> "Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U.S., at 622 and n. 4; 382 U.S., at 409, n. 3. On the other hand, apart from the application of the holdings in *Escobedo* and *Miranda* to the parties before the Court in those cases, the possibility of applying the decisions only prospectively is yet an open issue." 384 U.S. at p. 732.

Petitioners here are in the same posture as was *Johnson*. This is the first case to reach this Court which involves the application of the *Berger* and *Katz* cases to a state proceeding, completed prior to those decisions, in which the

government had obtained a wiretap order which was valid at the time it was issued.

Nor can it be argued that *Katz* applied the *Berger* standards to a case on direct appeal. *Berger* and *Katz* do not stand for the same proposition. Prior to *Berger* non-trespassory eavesdropping was still excluded from Fourth Amendment protection because of this Court's decisions in *Olmstead* and *Goldman*. *Berger* did not alter this doctrine.

As the New York Court of Appeals noted in *People* v. *Kaiser*, 21 N.Y. 2d 86, 100-01 (1967):

> "While Mr. Justice Clark [in *Berger*] indicates that that portion of *Olmstead* which held that speech was not capable of seizure has been 'negated' by subsequent cases, [*Goldman* v. *U.S.*, 316 U.S. 129; *Silverman* v. *U.S.*, 365 U.S. 505; *Clinton* v. *Virginia*, 377 U.S. 158] nowhere does his opinion state that the basis of the decision in *Olmstead* that wiretapping accomplished without an intrusion into the caller's premises infringes no constitutional right—has been negated by any subsequent decision. • • •
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> • • • • •
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> "The Court's apparent intention to stick to a distinction which can survive only as long as *Olmstead* remains viable, is evidenced in the closing paragraph of the *Berger* opinion."

In *Berger*, the Court confirmed this interpretation in the closing sentence of its opinion:

> "Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe it does." 388 U.S. at p. 64.

In this posture, *Katz* represented the first explicit statement that the Constitution also protected non-trespassory eavesdrops. It was in *Katz*, not *Berger*, or earlier cases, that the Court said:

> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at p. 353.

Thus, there is no reason to apply a test of prospective application different from that enunciated in *Johnson* and *Stovall*. The new rules should apply only to proceedings commenced after the decisions in *Berger* and *Katz*.

**B. The Tap Did Not Taint the Subsequent Proceeding.**

Petitioners contend that they were invalidly dismissed because the dismissal was based on the exercise by petitioners of their privilege against self-incrimination. These dismissals are connected to the wiretap by a tenuous series of links. It is alleged that an unconstitutional wiretap formed the basis for the investigation, which led to the inquiry before the Commissioner of Investigation, which led to the invocation of the privilege, which led to the hearing, which led to the dismissals.

Under the circumstances of this case, even if the Court applies retroactively the rules established in *Berger* and *Katz*, and even if the tap failed to meet the constitutional standards established by those cases, the subsequent disciplinary proceedings should not be invalidated. Instead, the Court should apply the common sense rule of *Nardone* v. *United States*, 308 U.S. 338, which applied the "fruit of the

poisonous tree" doctrine to wiretaps. As Mr. Justice Frankfurter said:

> "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such a connection may have become so attenuated as to dissipate the taint." (p. 341).

In this case the central question is whether the City may require an employee to answer questions regarding his employment and whether it may dismiss that employee for failing to answer such questions. If the City has this right, the source of the questions, assuming the source to be an unconstitutional wiretap, should not taint the proceeding. It should be remembered that the evidence obtained by the tap was not introduced. Rather, it was the failure to respond to questions allegedly derived from the tap which led to the dismissal.

If the City used illegal means in gathering evidence, such evidence or its fruits could never be used against the person from whom it was seized. Moreover, if an employee was coerced to incriminate himself because he was confronted with illegally obtained evidence, such confession or testimony could not be used against him. *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964); *People* v. *Rodriguez*, 11 N.Y. 2d 279 (1962).

In the instant case, neither the wiretap nor its fruits were used and the tap did not induce a confession. Instead, petitioners chose to assert their Fifth Amendment privilege either before the Commissioner of Investigation or before the Grand Jury. The result of the tap was a refusal to

answer. In the absence of the use of the evidence, these proceedings do not present a judicially cognizable violation of Fourth Amendment rights.

Yet, petitioners would have this Court hold that the wiretap precludes the City from questioning its employees about their jobs, or imposing disciplinary action for insubordination, or invoking other sanctions, even though no evidence from the illegal "search" was introduced against petitioners. Such a holding would distort beyond reason the common sense rule of *Nardone.*

Nor can it be contended that the tap was used to identify the Petitioners, as in *Tane, supra.* It was reasonable to expect that all the employees at the 91st Street Transfer Station would be called before the Commissioner of Investigation. By the nature of the operation of that facility all of the employees would have known of the improper acts of any of them. As the record indicates (R. 71a), the investigation and the subsequent tap were undertaken as a result of information received from a reliable informant. The tap was neither the basis for the investigation, nor the means of identifying the Petitioners as suspects; nor did evidence obtained from the tap provide the basis for their dismissals. Under these circumstances, the taint of the illegal tap, if indeed the tap was illegal, had been dissipated. See *United States* v. *McGavic,* 337 F. 2d 317 (6th Cir. 1964); *Rogers* v. *United States,* 330 F. 2d 535 (5th Cir. 1964); *Hollingsworth* v. *United States,* 321 F. 2d 342 (10th Cir. 1963).

**C. Petitioners Fail to Establish a Violation of Fourth Amendment Rights Under the Standards Established in *Katz* and *Berger*.**

As a result of *Berger* and *Katz*, it is clear that eavesdropping by law enforcement officials could constitute an unreasonable search and seizure, within the meaning of the Fourth Amendment. In *Katz*, the Court specifically held that a nontrespassory eavesdrop must meet the specific standards of the Fourth Amendment, including, as a general rule, the requirements of a warrant.

It was not the holding of this Court, however, either in *Berger* or *Katz*, that search warrants in full compliance with the Fourth Amendment must be used in all cases where conversations are "seized." Nor is it the contention of respondents that the City of New York is free to tap all its phones at all times, without warrants, merely because these phones are leased by the City. As the Court noted in *Katz*:

> "The Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. * * *
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> * * * * *
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> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States*, 385 U.S. 206, 210; *United States* v. *Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733." 389 U.S. at pp. 350-52.

Thus, under this test the question to be answered is whether petitioners could reasonably have expected that calls made on the phone at the 91st Street Marine Transfer Station would be free from interception by their employer, during an authorized investigation into irregularities regarding the performance of their duties.

Certain facts readily distinguish this case from *Katz*. Although these facts do not appear in the record, they are mentioned here for purposes of indicating to the Court the factors which the trial court should consider in determining whether the obtaining of wiretap evidence in this case was a violation of petitioners' Fourth Amendment rights, if the Court concludes that this issue should be reached in this case.

For example, the phone tapped by the Commissioner of Investigation was a City phone, used exclusively for the transaction of official business. It was the only telephone (with one extension) at the Transfer Station. It was not assigned to any individual employee. Department regulations prohibited any unauthorized use of the phones at that or any other Sanitation facility. The phone was not open to the public.

In *Katz*, on the other hand, the telephone which was "bugged" was a public phone which a person could expect to use in privacy when he paid his toll. In *Katz* there was only one suspect involved, who used the phone at regular times each day. As the Court noted, these were circumstances in which the warrant defining the limits of the search was most appropriate. In the case at bar, nearly all of the petitioners used the phone (R. 41a-62a) throughout working hours at the facility, which is open 24 hours a day.

Under these circumstances a trial court may find that a court order is neither practicable nor necessary or that the petitioners could not reasonably have expected privacy during the unauthorized use of the phone, particularly from intrusion by a City official who had a duty to discover and expose the misuse of City property.

Under circumstances analogous to the instant case, the Court of Appeals for the Second Circuit, in *United States* v. *Collins*, 349 F. 2d 863, *cert. den.*, 383 U.S. 960 (1965), declined to find a invasion of privacy. It sustained the conviction of a federal employee for mail theft where the primary evidence was obtained by a search, without a warrant, of defendant's office desk and jacket. In holding this to be a reasonable search and seizure, the Court said (349 F. 2d at pp. 867-868):

> "We have no doubt that the search of defendant's work area, including the surface and interior of his desk, conducted by Customs agent McDonnell and Post Office Inspector Forster was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a customs employee. Defendant was handling valuable mail for which the Government was responsible. The agents were not investigating a crime unconnected with the performance of defendant's duties as a Customs employee."

This Court has never held that all searches and seizures by government officials, made without a warrant, violate the Fourth Amendment. Experience has evolved rules concerning, for example, searches incident to a lawful arrest, *Agnello* v. *United States*, 269 U.S. 20 (1925), *Ker* v. *California*, 374 U.S. 23 (1962); searches of moving vehicles,

*Carroll* v. *United States,* 267 U.S. 132 (1925), *Brinegar* v. *United States,* 338 U.S. 160 (1948); and, most recently, administrative inspectional searches, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *See* v. *Seattle,* 387 U.S. 541 (1967). In *Berger* and *Katz* this Court charted new areas of constitutional protections when it specifically applied Fourth Amendment protections to conversations, including those garnered by non-trespassory eavesdrops. As in the case of the seizure of objects, or in the development of procedures for administrative inspectional warrants, experience in this evolving area of law militates against the adoption of a rule which would apply strict Fourth Amendment standards to all eavesdrops by the government of its employees' conversations.

This Court should recognize the legitimate need of government to ascertain whether its equipment, including its phones, is being used in an unauthorized manner for non-governmental purposes. Respondents do not suggest that government employees do not have a right to privacy with regard to their conversations, even on government phones. Respondents do contend, however, that the facts of this case, if fully developed in an adequate record, would establish that the tap of this phone, under the circumstances surrounding the tap, was not an unreasonable search and seizure. If this Court finds it necessary to reach this constitutional question in light of the compelling arguments already made concerning the retroactive application of *Berger* and *Katz* and the tenuous link between the tap and these proceedings, the Court should remand in order for the trial court to ascertain the facts upon which a sound constitutional determination could be made.

**D. The Alleged Violation of Section 605 of Federal Communications Act Does Not Invalidate the Dismissal of Petitioners.**

Petitioners contend that the wiretap used by the Commissioner of Investigation violated their rights under §605 of the Federal Communications Act and thus, all subsequent proceedings are invalid.

Even if there had been a violation of §605, for the reasons stated in subdivision (B), above, there was no causal connection between the interception of the conversations involving petitioners and their subsequent dismissals. Neither the tapped conversations nor any evidence obtained through them was ever used against petitioners in their disciplinary hearing or in any subsequent proceeding. Their dismissals were based on their refusal to answer questions relating to their duties, or on their withholding of information by refusing to waive immunity from prosecution when called before the grand jury.

If the Court, however, were to determine that the tap did affect subsequent events, the use of such evidence, or its fruits, is permitted in state proceedings under the doctrine of *Schwartz* v. *Texas,* 344 U.S. 199 (1952). In light of that decision, this Court should reject the argument that *Mapp* v. *Ohio,* 367 U.S. 643 (1961), which required the exclusion of evidence obtained in violation of the Fourth Amendment in state as well as federal courts, overruled *Schwartz.* In *Pugach* v. *Dollinger,* 365 U.S. 458 (1961), decided only a few months prior to *Mapp,* this Court reaffirmed the *Schwartz* doctrine. While an unconstitutional wiretap would be inadmissible in state trials under *Mapp,* a finding of a violation of §605 alone does not sustain petitioners' claims.

## CONCLUSION

**The judgment below should be affirmed.**

April 12, 1968.

Respectfully submitted,

J: Lee Rankin,
*Corporation Counsel of the*
*City of New York,*
*Attorney for Respondents.*

Norman Redlich,
John J. Loflin,
Robert C. Dinerstein,
*of Counsel.*

# APPENDIX

New York City Charter §1123:

> "Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)"

New York State Code of Criminal Procedure §813-a:

> "Ex parte order for eavesdropping. An ex parte order for eavesdropping as defined in subdivision one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that

there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extention or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

Communications Act of 1934, 47 U.S.C. §501, §605:

"§501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or

fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, §501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

* * *

"§605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by

the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103."

New York State Civil Service Law §75:

"*Removal and other disciplinary action*

1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period riod not exceeding thirty days.* * * If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such

period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.